LIBRARY,
COURT, U. S.

FILED
OCT 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74/264

BANCO DO BRASIL,

Petitioner,

vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT VENORE TRANSPORTATION COMPANY

DANIEL HUTTENBRAUCK,
Counsel for Respondent
Venore Transportation Company
27 William Street
New York, New York 10005
(212) 344-7100

IN THE

Supreme Court of the United States

October Term, 1974

No. 74/264

BANCO DO BRASIL,

Petitioner,

vs.

VENORE TRANSPORTATION COMPANY and OSWEGO SHIPPING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

BRIEF FOR RESPONDENT VENORE TRANSPORTATION COMPANY

Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit from an opinion of that Court[1] which insofar as the respondent Venore Transportation Company is concerned affirmed an opinion and judgment of the Hon. Edward Weinfeld of the United States District Court for the Southern District of New York[2].

This is an action by Venore Transportation Company to recover damages to its vessel, the S/S SANTORE, as a resul of an unsafe berth while at the port of Salvador, Brazil, under time charter to Oswego Shipping Corporation and

1. 498 F. 2d 469 (C.A.2C., 1974)
2. 363 F. Supp. 1366 (D.C.S.C.N.Y., 1973)

under sub-voyage charter to Banco do Brasil, petitioner herein who was third party defendant in the action in the Southern District. The Trial Judge found that there was a breach of the warranty of a safe berth in the charter by the time charterer and awarded plaintiff damages in the agreed sum of $265,727.29 with costs. On the claim over by Oswego Shipping Corporation the Trial Judge allowed a recovery against Banco do Brasil for one-half of the judgment awarded to plaintiff, Venore Transportation Company, to wit, the sum of $132,863.96 and half the costs of the action. Both defendant and third party plaintiff, Oswego Shipping Corporation, and third party defendant, Banco do Brasil, filed respective notices of appeal to the United States Court of Appeals for the Second Circuit. No appeal was taken by plaintiff, Venore Transportation Company.

The issue in the Circuit Court of Appeals was not the recovery of plaintiff but rather the holding that the two warrantors in the two charter parties should contribute equally to the recovery of Venore Transportation Company. On page 13 of its brief, in the Circuit Court of Appeals Oswego Shipping Corporation concedes that "There is, however, evidence to support the findings of the court below as to the safety of the berth and the lack of negligence on the part of the ship's master, Captain Edelheit. The argument on behalf of Appellant Oswego in this brief is mainly directed to the failure of the court below to accord to Oswego the right of full indemnity against its subcharterer Banco." Again in the conclusion on page 25 of its brief Oswego Shipping Corporation states that "Oswego is entitled to full indemnity from Banco do Brasil. The final judgment entered herein should be modified and amended accordingly." Significantly not a word that the judgment entered in favor of plaintiff should be disturbed. In its brief in the Circuit Court of Appeals, the third party de-

fendant Banco do Brasil makes a vain attempt to reduce the recovery of Venore Transportation Company by 50%. In a unanimous opinion the Circuit Court of Appeals affirmed the judgment below insofar as the recovery of Venore Transportation Company was concerned and modified the judgment granting the time charter complete indemnity by the voyage charter.

Issue Presented

The issue presented on the petition for a writ of certiorari does not involve the judgment entered in favor of plaintiff, Venore Transportation Company, one of the respondents herein. The question presented is whether the law requires a division of damages between the warrantors of a safe berth in the two charter parties. Neither in the brief submitted by Banco do Brasil, voyage charterer, in support of the petition for the writ of certiorari nor in the brief submitted by Oswego Shipping Corporation, time charterer, is any issue raised that the award to plaintiff should be reversed. In fact on page 4 of the brief of Oswego Shipping Corporation it states that "There is no issue as to unsafe berth or of Oswego's liability to Shipowner."

CONCLUSION

The judgment below awarding plaintiff, Venore Transportation Company, respondent herein, damages in the sum of $265,727.29 with costs, should be affirmed.

Respectfully submitted,

DANIEL HUTTENBRAUCK,
Counsel for Respondent
Venore Transportation Company
27 William Street
New York, New York 10005
(212) 344-7100